

Minutes of the Kansas Sentencing Commission Meeting July 15, 2004

The Honorable Ernest L. Johnson, Chairman, called the Kansas Sentencing Commission meeting to order on July 15, 2004, at 1:45 p.m. The meeting was held in the Senate Room of the Jayhawk Tower Building, Topeka, KS.

Attendance

Members: Honorable Ernest L. Johnson, Chairman; Paul Morrison, District Attorney, Vice Chairman; Honorable Eric Rosen; Honorable Christel Marquardt; Senator Greta Goodwin; Senator John Vratil; Representative Janice Pauls; Representative Jeff Goering; Annie Grevas, Director of Community Corrections, 28th Judicial District; Chuck Simmons, designee, Department of Corrections; Chris Mechler, Office of Judicial Administration; Rick Kittel, Board of Indigents' Defense Services; Kathleen Lynch, Private Defense Attorney; Dr. Donald Jackson, Public Member. Staff: Patricia Biggs, Executive Director; Julia Butler, Staff Attorney; Kunlun Chang, Research Director; Fengfang Lu, Research Analyst; Lora Moison, Research Analyst; Heidi Zimmerman, Research Analyst; Brenda Harmon, Administrative Assistant; Marty Schmiedeler, Accountant. Guest: Jeremy Barclay, Department of Corrections.

Approval of the Minutes

The Chairman referred to the minutes of the May 19, 2004, Kansas Sentencing Commission meeting and asked for a motion to approve. A motion was made by Representative Janice Pauls, and seconded by Ms. Chris Mechler, to approve the minutes of the May 19, 2004, Kansas Sentencing Commission meeting. The motion carried.

U.S. Supreme Court Decision – Blakely v. Washington

Chairman Johnson discussed the Supreme Court's reference to the Kansas Legislative response to Apprendi in Blakely v. Washington. In Blakely v. Washington the Supreme Court not only affirmed its holding in Apprendi, but specifically invoked the majority opinion and made reference to our Legislative response to Apprendi with favor. Vice Chair Paul Morrison has been quoted in recent news articles concerning this case, and provided an update. He served on a committee that closely read Gould and Apprendi and proposed a statute that was constitutional under Apprendi and Gould, and which the Legislature passed. This case had to do with setting up a system where the jury would be able to make factual findings for upward durational departures. The Sentencing Commission has received several inquiries from other states asking how we've handled this. VERA has requested data so they can put something together for other states, both pre-Gould and post-Gould, to show the decline in the number of upward durational departures.

2004 Guidelines Desk Reference Manual

Ms. Julia Butler emailed the 2004 Presentence Investigation, Journal Entry of Judgment and Probation Revocation Forms to Commission members the first part of July for their review. Following a discussion by Commission members, Ms. Kathleen Lynch made a motion to approve the forms for the 2004 Desk Reference Manual. Mr. Jeff Goering seconded the motion. The motion carried. About 2,400 manuals will be printed this year. The 2004 Desk Reference Manual is now on the web site. The same mailing list will be used as in prior years. If additional copies are requested, they may be downloaded from the web site or photo copied at no cost, or additional hardbound copies may be requested for a \$10 fee.

Vice Chairman Morrison raised a concern with needing to use the correct forms with the appropriate year of offense (example: using a 1999 Journal Entry of Judgment form for an offense committed in 1999). Commission members discussed the possibility of changing guidelines so only the current forms be used, no matter what year the offense was committed. This issue was tabled for now, and will be discussed in further detail at another Commission meeting.

Ms. Patricia Biggs discussed a Journal Entry of Judgment Form currently being used by one court out of Sedgwick County that is not the form statutorily approved by the Sentencing Commission. The sentence imposed on these forms has been reported as confusing and difficult to interpret by several different offices. The sentence imposed on one specific Journal Entry of Judgment has been interpreted differently by three different agencies. Commission members were not willing to approve use of this as an alternate form. Discussion will continue with this court in an effort to help them comply, so data provided to the Legislature will be accurate.

Re-appointment of Commission Members

The Chief Justice has re-appointed the Honorable Ernest Johnson for another two-year term as Chairman of the Kansas Sentencing Commission. Ms. Chris Mechler, the Honorable Christel Marquardt and the Honorable Eric Rosen also were re-appointed by the Chief Justice as Commission members.

Prison Population Subcommittee

Prison population subcommittee chairman Paul Morrison reported the first meeting scheduled for this subcommittee will be in August. A report will be made at the next Commission meeting.

Senate Bill 123 Subcommittee

The Senate Bill 123 subcommittee was formed to look at changes that may be suggested to the Legislature during the upcoming session. Subcommittee Chairman Ernest Johnson reported on several possible suggestions he's been investigating:

- According to the fiscal notes and material given to Commission members when SB 123 was first being considered, the only crime of conviction SB 123 would apply to would be possession. The way the statute ended up being worded though, SB 123 is not excluded from use in a multi-conviction situation. This language needs to be tightened up to make it clear that the only crime of conviction in the case be a possession offense.
- The attempt, conspiracy and solicitation convictions of both the included offenses and the excluded offenses have raised a lot of concern. Technically the way the statute is worded, if the conviction is for an “attempted” offense, the conviction is not for the offense, and therefore the offender does not receive the otherwise mandated drug treatment. In *State v. Martens*, which is a Supreme Court case, it said if you’re convicted of an attempted offense, you’re not convicted of the offense; you’re convicted of the attempt. The same is true for some offenses that exclude the offender from mandated treatment, such as sale of cocaine. If the conviction is attempt, conspiracy or solicitation of sale of cocaine, the offender is not convicted of one of the statutorily excluded offenses; they’re convicted of the attempt, conspiracy or solicitation. Should the attempted, conspiracy or solicitation convictions be included? This wording needs to be clarified.
- How should out of state residents be handled? Commission members suggested at the September, 2003, meeting that a departure out of treatment for a non-resident conflicted with the Legislative intent of the statute and they urged judges to exercise their own discretion. This could be clarified in the law to show judges had discretion with non-resident SB 123 convictions.
- How should plea bargains be handled?
- Another area that has recently come up is the offenders who have criminal history classifications A through D and are in the discretionary SB 123 pool. If they’re revoked and sent to prison, do they receive post-release supervision on that prison term or not? This issue has not been addressed.

The committee plans to meet within the next few weeks, and will have a report at the next Commission meeting.

Senate Bill 123 Community Corrections Feedback Plans for FY 2005

Ms. Patricia Biggs provided an update on Community Corrections Feedback Plans that have been received from all agencies. The results are being compiled and processed to find out if there are any pervasive themes in areas where Community Corrections is experiencing challenges. This information will show if there is a need for action to be taken either administratively or legislatively to better facilitate the process.

Community Corrections agency directors were also asked to volunteer for one of three subcommittees. One subcommittee will look at the offender reimbursement process; one

will look at any kinds of language changes they see as being necessary from a field perspective level; and one will talk about courtesy supervision when offenders transfer between community correction agencies, and how the invoice itself should be authenticated in those cases. Ms. Biggs hopes to have reports back from these committees in 6-8 weeks.

Senate Bill 123 Treatment Duration

Ms. Biggs discussed the cost caps for each of the approved SB 123 treatment modalities, and their components, which include the intensity and the duration of each modality. Four issues have been raised so far. One concern has to do with the intermediate residential treatment. Although the treatment range says 7-40 days in length, there are individuals who have been remaining in this treatment at \$180 per day for 60, 75 and 90 days. Another concern voiced is with group treatment in one location. Instead of the approved 1-8 hours per week with 8-12 weeks in length, an offender has been receiving 2 hours per week for 48 weeks. A letter from another agency included a request from a treatment provider requesting an extension of treatment for an offender who has very substantial mental health problems which are not covered under SB 123. Because of the mental health issues, they want to maintain the offender in intermediate residential for an additional 40-60 days over the 41 days already served.

Following a discussion by Commission members, Representative Janice Pauls made a motion to have the Sentencing Commission send out a memo to all Community Corrections agency directors and treatment providers stating the initial cost and components to all approved treatment modalities are firm caps, and no exceptions will be made. Annie Grevas seconded the motion. The motion carried.

A motion was made by Ms. Chris Mechler and seconded by Ms. Annie Grevas to include one additional treatment modality to accommodate the “Thinking for a Change” curriculum under group outpatient treatment. The cost cap will be \$25 per hour, the same as the group rate, for 19-22 sessions at 1.5 hours each. (This 1.5 is average and can range from 1-3 hours in total and depends on the size of the group.) The motion carried.

Proportionality Study – update from VERA

Ms. Biggs provided an update on the proportionality study from the VERA Institute. They are conducting exploratory analyses based on data received from the Sentencing Commission. They found a small amount of proportionality in the possession of precursors for methamphetamine, which is a higher severity level than possession of methamphetamine. After this analysis is completed, they will try to reconcile the sentences for different offenses with the initial goals and philosophies that the guidelines were set up under. VERA is looking to have a draft of their report back to the Sentencing Commission the first week in August.

Senate Bill 45 Committee

Representative Ward Lloyd spearheaded this committee to review all aspects of sentencing. No known activity has been reported as of this date.

Prison Population Projections

- Ms. Biggs discussed the prison population projections monthly monitoring report. We were off in the aggregate by 19 offenders at the close of the fiscal year. This made us off about two tenths of one percent.
- Data has been received by the Department of Corrections to work on the FY 05 projections. Preliminary analysis is currently being worked on.
- Letters have gone out to schedule the initial consensus meeting, which does the input assumptions. It has been scheduled for July 24th.

Juvenile Population Projections

The Sentencing Commission agreed last year, not under statute, to produce population projections for JJA. They have the same budgetary requirements as DOC to get their numbers ahead of time. JJA hopes to get data to us by the end of July, and they would like the results by September 1st. Ms. Biggs notified them the process would take about 12 weeks.

Data Requests from Outside Researchers

Dr. Sanford Gordon, NYU, submitted an additional request on demographic variables for judges. He has already paid the last invoice for his initial request, and will be billed an additional \$300 to cover staff hours needed to compile this request.

A request has been received from Dr. Nancy King at Vanderbilt University. She is looking for data bases on Journal Entries from 1998 through 2002, and requested data on most all information filed for those years. Ms. Biggs will send a letter to be used as an agreement for Dr. King's approval and signature. This agreement will state the data is for her information only and not to be shared. It will include the fee amount, and time frame required to provide this request. Commission members approved the fee of \$100 per hour for Dr. King's request, and any additional future requests.

KSC Staff

Ms. Biggs introduced Heidi Zimmerman, who joined the Kansas Sentencing Commission staff in June. She is a Research Analyst, and will work primarily with the Juvenile Justice Data.

Next Meeting

The next Kansas Sentencing Commission meeting was scheduled for Thursday, August 26th, 2004, at 1:30 p.m.

Senator John Vratil made a motion to adjourn the Sentencing Commission meeting. Chairman Johnson seconded the motion. The motion carried, and the meeting was adjourned.